C.K. TAY SDN. BHD.

v.

ENG HUAT HENG CONSTRUCTION & TRADING SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[ORIGINATING MOTION NO. 32-2 OF 1988]
5 OCTOBER 1988

ARBITRATION: *Application to remit award to arbitrator - Misconduct - Allegations of - Whether arbitrator failed to decide all issues referred to him - Balance of convenience - Arbitration Act s. 25.*

The applicant by notice of motion sought an order to remit the award made between the parties for consideration to the arbitrator. The applicant's contention was that:

(i) The arbitrator relieved the respondent of the obligation to provide a letter of indemnity which the respondents were contractually bound to provide.

(ii) the arbitrator failed to make any decision as to price differences arising from the substitution of high tensile bars with mild steel bars.

(iii) the arbitrator failed to deal adequately with the question as to delay in the completion period and consequently failed to arrive at a quantum for such delay.

(iv) the arbitrator did not decide correctly the issues as to the defects in the building.

The applicant argued that the arbitrator exercised his discretion incorrectly and acted beyond his powers.

Held:

[1] The arbitrator was correct in deciding that the letter of indemnity was not required as the provision of a perpetual indemnity was not a term of the contract and the consultant engineer did not object to such substitution.

[2] The arbitrator was correct in deciding that there was no price difference in using the mild steel bars as these were reinforced to equivalent strength and further that the applicant at the relevant time did not raise any objection as to the substitution.

[3] The inclement weather was the basis for the arbitrator arriving at his award as regards delay.

[4] The issue of defects in the building is a non-issue since the applicant retained 5% of the contract sum and the defect was complained of after the defect liability period.

[5] Thus there are no merits in this application and the balance of convenience lies in favour of not remitting the award to the arbitrator.

[Application dismissed.]

Cases referred to:

Ong Guan Teck & Ors. v. Hijjas [1982] 1 MLJ 105; [1982] 1 CLJ 131
Official Assignee v. Chartered Industries of Singapore Ltd. [1978] 2 MLJ 99
Tan Toi Lan v. Lai Kee Ying [1975] 1 MLJ 27

Legislation referred to:

Arbitration Act 1952, s. 23

For the applicants - C.H. Tok; M/s. S.K. Song
For the respondents - Tay Bee Choo; M/s. Sze-Ping & Tay

JUDGMENT

Abu Mansor Ali J:

By the applicants' notice of motion dated 21 January 1987 (encl. 3), applicant prays for an order that the award made between the parties to the arbitration by Ching Goo Kia dated 10 December 1987 may be remitted for consideration by the said Ching Goo Kia of the following matters referred to him namely matters pertaining to the letters of indemnity to be provided by the respondents; the difference in price resulting from the substitution of high tensile bars with round bars; the period of delay in the completion of the project; the provision of the fire extinguishers and the defects of the buildings and the effects of its sale.

After hearing arguments of Counsels, I reserved judgment to a date to be fixed.

The facts of the case as can be gathered from the affidavit of Tay Chong Keng affirmed on 21 January 1988 encl. (2) are as follows: By an agreement in writing dated 27 August 1987 made between the applicant and respondent, it was agreed that one Ching Goo Kia be appointed to arbitrate the numerous issues as contained in the agreement. On 10 December 1987 the arbitrator made an award exhibited as 'B'.

It was urged on the Court by Mr. Tok, Counsel for the applicant that the arbitrator has exercised his discretion incorrectly in some of the matters referred to him for decision. Firstly, the allegation of the applicant is that the arbitrator relieved the respondents of the obligation to provide a letter of indemnity despite that the respondents were contractually bound to provide for same. Applicant says that the arbitrator has in doing so acted beyond his authority. The applicant referred the Court to para. 2 of applicants' manager's affidavit encl. (7) dated 29 June 1988 Exhibit 'A' to the effect that a letter of indemnity had to be provided by the respondent. Counsel alleged that during the arbitration proceeding, the arbitrator waived that requirement without the consent of the applicant. He charged that since it is a term of the contract that a letter of indemnity be provided, it could not be waived unless agreed to by the parties. In doing so, Counsel submitted that he had acted in excess of his authority.

Miss Tay on behalf of respondent contended however that it was never a contractual obligation to provide indemnity. This was alleged in p. 4 of encl. (4) that it was not part of the contract for the respondent to provide a letter of indemnity. It arose out of a request by the engineer employed by the applicant in a letter dated 20 November 1985. The contract required that high tensile steel bars be used. As high tensile steel bars were not available, mild steel bars had to be used. As a result of this change of terms to use mild steel bars, letter of indemnity was asked for from the respondent by the consultant engineer. Counsel says the respondent did provide the letter of indemnity for 12 months from 5 June 1987 to cover the defect liability for that period. The certificate of fitness was then issued on 30 January 1987.

Respondent's Counsel further contended that the arbitrator made a finding that the letter of indemnity was not required as the consultant engineer did not object to such substitution. The substitution was made in the revised plan and it was part of the contract. The acceptance was evidenced by the fact that by 17 March 1986 no more reference was made to any indemnity as the said revised plan was duly endorsed by a professional engineer.

The second complaint of the applicant of the arbitrator's award was the arbitrator failed to decide whether or not there was any price difference resulting from the substitution of high tensile to mild steel bars. He says the question was referred to the arbitrator during the course of the proceedings but the arbitrator failed to make a decision. The applicant conceded that what the arbitrator did was to decide that since both parties did not make a claim hence no claim was allowed. The applicant's Counsel says the issue was referred but no decision was made by the arbitrator.

For the respondent, it was argued that it was not true to say that the arbitrator had wrongly decided on the difference in price. She argued further that the arbitrator decided there was no difference in price in using the mild steel bar which was built to equivalent strength. Evidence was led over three days' hearing and he decided and the arbitrator was a qualified engineer.

The third ground for seeking to remit back the arbitrator's award was the period of delay referred to the arbitrator. The issue was whether or not there was a period of delay in completion. If there was such a delay then what was the quantum? Applicants' Counsel contended that the arbitrator did not deal adequately on this issue. The arbitrator merely gave an amount on the assumption without any reasonable basis. Counsel said further this can be seen from these findings.

In reply Counsel for the respondent refuted applicants' Counsel's argument that the award was without basis. She maintained that the arbitrator's award for delay was based on the evidence of the respondent. The delay was explained by the respondent due to inclement weather condition beyond the control of the respondent and also due to the alteration of the plans required by the applicant. Hence work was delayed. The arbitrator after giving due consideration to these factors, made an award for the delay but it was not to applicants' satisfaction.

The last issue allegedly not correctly decided by the arbitrator was the issue of defects to the building. The applicant's complaint stems from the fact that the arbitrator merely stated that the defects will be rectified by the respondent after the other issues had been settled. This issue will only be settled after the settlement of all issues. The applicant says the arbitrator should have decided rather than postpone this issue.

The respondents' Counsel submitted that the defects was not an issue at all. She submitted further at all times the application had retained 5% of contract sum to cater for defect liability. It was a fact Counsel alleged that the question of defect was not raised at all until the letter of demand by the respondent for the balance of contract sum. The letters of defect were dated (i) 23 February 1987, (ii) 24 February 1987 and (iii) 27 February 1987 from three purchasers couched in same terminology when the complaint of defect had passed the defect liability period.

Counsel for the appellant urged that the Court may have the award remitted back to the arbitrator if the Court is satisfied that the arbitrator has misconducted himself. Applicants' Counsel cited *Ong Guan Teck & Ors. v. Hijjas* [1982] 1 MLJ 105; [1982] 1 CLJ 131 where it was said that one of the grounds an award may be remitted was on the ground of misconduct of the arbitrator. In *Official Assignee v. Chartered Industries of Singapore Ltd.* [1978] 2 MLJ 99 where it was said misconduct occurs when the arbitrator fails to decide all matters which were referred to him. Although it was not a ground of Counsel's submission, he also cited

that an award may be invalidated if the effect of the award results in uncertainties. He cited *Tan Toi Lan v. Lai Kee Ying* [1975] 1 MLJ 27. As the application in that case was not answered by the arbitrator, I did not think the case was relevant.

After hearing argument by the parties and the authorities cited, I find the application lacked merit. I did not find that the arbitrator has misconducted himself i.e., have failed to decide all issues referred to him as alleged.

On the issue of letter of indemnity, I am of the view that the arbitrator did not relieve the respondent from having to give a letter of indemnity. My finding is based on the consultant's letter dated 20 November 1985 Exhibit 'A' in encl. (7), the consultant wrote:

> (ii) For RC structures (e.g. footings, ground beams) already cast with mild steel bars for diameters ½" and larger, you are required to give an undertaking ... for any structural damage due to under reinforcement of structures completed up to 19 November 1985.
>
> (iii) There is no objection to the use of round bars for diameters ½" and larger provided you increase the reinforcement area to provide the equivalent strength. Therefore, it is necessary that you revise the structural drawings to indicate the equivalent strength enclosing a chart table for us to check.

I found that the provision of a perpetual indemnity was not a term of the contract. The arbitrator seems to have adopted the attitude that the building work can be continued by using a substitute of mild tensile bars but suitably reinforced and such substitution be incorporated in a revised plan to be certified by a consultant engineer. The applicant never insisted that the substitution be subject to terms and conditions that he be compensated for price difference at the time of this substitution. As submitted by Counsel for the respondent by a letter dated 17 March 1986 there was no more insistence on indemnity as the revised plan using mild tensile was endorsed by another consultant. As a matter of fact, it was not disputed that the respondent did provide a letter of indemnity for 12 months from 5 June 1987 to cover the defect liability period of 12 months when the certificate of fitness was issued on 30 January 1987. In the face of these facts, I am of the view the arbitrator was correct in deciding that the letter of indemnity was not required as the consultant engineer did not object to such substitution.

As to the second ground of price difference, the arbitrator at p. 5 of exhibit attached to encl. 4 says:

> The architect had not commented on whether the employer would be given the benefit of cost saving should the substitution of steel bars be allowed nor on the other hand had the employer asked the employee for any discount in his agreed terms. Also the employee had not asked for any increase in price (in most circumstances the contractor would not ask for an increase though contractually he is entitled if he can show cause and if he gets the consent of the employer). As such it is fair for both parties that no claim for increase or decrease shall be allowed for both parties.

I also found that there was no misconduct on the part of the arbitrator on this issue. Since the applicant had not raised any objection on the substitution of mild steel bars through their consultant engineer, it was therefore no longer tenable to talk of price difference. Price difference could be a point of dispute if so made and the condition imposed that the use of mild steel bars be made the subject of the payment of price difference. No such stand was initially taken by the applicant or consultant and I am of the view that the arbitrator was correct when he decided that there was no price difference in using of the mild steel bars and reinforcing to equivalent strength.

As regards the third point of contention that there was delay, it is not disputed that an award was made but applicant alleged there was no basis. I am of the view that the respondents' Counsel has given reason for the arbitrator coming to such an award, that delay was explained due to inclement weather and the applicants' alteration of plan contributing to delay.

Then lastly on the issue of defect, I am satisfied that the issue of defect is a non issue before the said arbitrator since the contract sum of 5% has been retained by the applicant and the complaint of defect was well after the defect liability period.

I find substance in the submission of the Counsel for the respondent that the misconduct that may cause the matter to be remitted is when the arbitrator has failed to decide all issues referred. There is also substance in respondents' Counsel's contention that it would appear that applicants' application to have the matter remitted is to ask the arbitrator to reconsider when he had already considered and not that he had failed to decide. It is also said in *Ong Guan Teck & Ors. v. Hijjas* [1982] 1 MLJ 105; [1982] 1 CLJ 131 s. 23 of the Arbitration Act confers a wide but limited discretion for the Court to remit the award. Like all discretion it has to be judicially exercised. Before the Court can remit to the arbitrator, it had to ask what was the balance of convenience. Apart from the merit already discussed the Court also held that the balance of convenience was against the Court giving an order remitting it to the arbitrator. Apart from the merit, to remit will cause hardship to the respondent and will drag this matter to no end. I considered the arbitration was at applicants' request and accepted by the respondent. They both agreed to a single arbitrator and respondent even agreed that the cost and disbursement be paid solely by the respondent. In the parties attempt to have the matter settled it was initially agreed that any undisputed sum, if such sum can be ascertained by the applicant, be paid to respondent immediately leaving only such disputed sum to be paid to applicants' solicitors' Counsel for safe keeping until arbitration proceedings had been completed. Respondents' Counsel commented on the action of the applicant that when a search was conducted it was revealed that applicant had charged his property at around the time of the arbitration proceeding. As this matter had taken such a long time, if this matter was to be remitted, the respondent would only agree to it if applicant could pay the sum claimed RM197,225.66 into Court and the applicant could take all the time he required to have this matter resolved.

For reasons given, I found there is no merit to this application and I also hold the balance of convenience lies in favour of my not remitting the award to the arbitrator. I therefore dismiss the application with costs to be taxed to the respondent.

Also found at [1989] 1 CLJ 434